

REAL ID ACT OF 2005 MARCH DEADLINE FOR APPLICATION FOR EXTENSION

A Report Prepared for the
Legislative Finance Committee

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PURPOSE

The purpose of this report is to update the Legislative Finance Committee (LFC) on recent activities related to the REAL ID Act of 2005 (Public Law 109-13) including the publication of final rules and the time frame for states to apply for an extension of the deadline for compliance with the act. Because the Law and Justice Interim Committee will likely be reviewing the status of this issue at a future date, this report for the LFC focuses on potential financial implications, imminent deadlines for applications for extensions, and the immediate impacts on Montana residents of implementation of provisions of the act.

BACKGROUND

The REAL ID Act of 2006 (Public Law 109-13) was signed into law in May 2005. This law contains several provisions, but this report will deal only with the provisions of the portion referred to as the REAL ID Act of 2005. This act provides for regulations for state issued driver's licenses and identification cards. Specifically, the act requires that in order for state driver's licenses or identification cards to be used for an official federal purpose, the cards must meet minimum standards, including standards related to verification of documents establishing identity, birth date, social security number, name, address, the person's lawful status in the United States, security of department of motor vehicle facilities and databases, information that must appear on the driver's license or identification card, document and record retention, etc. The act defines "official purposes" as including but not limited to:

- Accessing federal facilities
- Boarding federally regulated commercial aircraft
- Entering nuclear power plants
- Any other purposes that the Secretary of Homeland Security shall determine

The many stakeholders in the use and issuance of state driver's licenses identified a number of concerns with the act, including: potential violation of individual privacy rights, increased identity theft, and imposition upon the states of an unfunded federal mandate. While the Department of Homeland Security (DHS) intends to make some grant funding available, much of the cost burden of implementing these regulations would fall upon states and potentially applicants for driver's licenses and identification cards. As indicated in the 2009 Biennium Legislative Budget Analysis, Volume 6, Montana's estimated costs of implementation of these regulations was one-time costs of \$8.6 - \$11.5 million and ongoing costs of \$5.9 to \$8.0 million based upon the proposed rules.

Because the final rules contain a number of changes from the proposed rules, this cost estimate is no longer applicable. However, the agency has not yet undertaken development of a revised cost estimate. Based upon differences between the proposed rules and final rules, the Department of Homeland Security (DHS) has lowered its estimate of implementation costs from \$14.6 billion to \$3.9 billion.¹ Congress has appropriated about \$90 million² to assist states with implementation of the act.

2007 Legislative Action

During the 2007 session the legislature adopted and the Governor approved legislation directing the Department of Justice not to take action to implement requirements of the REAL ID Act of 2005. Specifically, 61-5-128 MCA states:

“(1) The legislature finds that the enactment into law by the U.S. Congress of the REAL ID Act of 2005, as part of Public Law 109-13, is inimical to the security and well-being of the people of Montana, will cause unneeded expense and inconvenience to those people, and was adopted by the U.S. Congress in violation of the principles of federalism contained in the 10th amendment to the U.S. constitution.

(2) The state of Montana will not participate in the implementation of the REAL ID Act of 2005. The department, including the motor vehicle division of the department, is directed not to implement the provisions of the REAL

¹ January 11, 2008 ABC News, DHS Announces New License Security Standards, Jason Ryan, Pierre Thomas and Theresa Cook; January 11, 2008 Washington Post, States Will Get More Time for Secure ID Plan, Spencer S. Hsu

² January 14, 2008 National Conference of State Legislatures, Information Alert, Brief 1 Deadlines, Definition of Official Purpose, Reenrollment, State certification and reporting, state exceptions process, and funds.

ID Act of 2005 and to report to the governor any attempt by agencies or agents of the U.S. department of homeland security to secure the implementation of the REAL ID Act of 2005 through the operations of that division and department.”

Thus, as Montana statutes currently exist, the Department of Justice is prohibited from implementing the provisions of the REAL ID Act of 2005.

EXTENSION APPLICATION AND IMPLICATIONS OF NON-COMPLIANCE

Since passage of the REAL ID act in 2005, states have been relying on the law and a notice of proposed rule-making to determine issues, actions, and the potential cost of obtaining compliance with this act. Final rules for the implementation of this act were published January 29, 2008, almost three years after the legislation became law. The final rules contain a number of changes from the proposed rules.

The most significant potential impact of non-compliance with the final rules is that effective May 11, 2008, residents of non-compliant states will not be able to use their state issued driver’s license or identification card to board federally regulated aircraft (or to enter a federal building) and would need to provide federally acceptable identification such as a passport or be subject to secondary screening prior to being allowed to board.

One of the primary and imminent provisions of the final rules is the provision of an opportunity for states to request an extension for compliance with the rules. This extension must be submitted by “the highest level executive official in the state overseeing the DMV” by March 31, 2008. If a state does not file a request for an initial extension, the state will be deemed non-compliant with the act. If a state is either in compliance with the act or has an approved extension, the state driver’s license or identification card may be used for official federal purposes.

The initial extension request, (filed by March 31, 2008) if received³, would expire December 31, 2009. In addition to the initial extension request states may file a request for an additional extension by October 11, 2009. The application for an additional extension (filed in 2009) must include a “material compliance checklist” indicating the state’s level of compliance with the act.

Therefore, if Montana either ignores the law and/or does not seek an extension, Montana citizens could be subject to (potentially major) inconveniences, particularly when boarding federally regulated commercial aircraft.

The primary question for the legislature is whether it wishes to preclude any potential non-compliance with the REAL ID Act by taking action prior to March 31. This question in large part hinges on two questions:

- Should the state apply for an extension?
- Given the Montana statute as written, can the state even apply for an extension?

GOVERNOR’S CORRESPONDENCE

A few days after DHS promulgated final rules for implementation of the REAL ID Act, Montana’s Governor sent a letter to the Governor of Colorado encouraging the undertaking of a joint effort to resist complying with the act and to not apply for an extension. According to information provided to the Department of Justice by the American Association of Motor Vehicle Administrators (AAMVA) as of January 24, 2008 30 states, including Colorado, had submitted request for an extension. It was department staff’s understanding that these 30 states

³ During a January 29, 2008 personal conversation with Dean Roberts, Administrator Motor Vehicle Division and Skip Culver, Administrator Centralized Services, Mr. Roberts indicated his expectation was that Montana’s request for an initial extension would be granted if it was submitted.

represented about 70 percent of the nation's population.⁴ Department staff indicated that as of February 19, 2008, the number of states that had applied for an initial extension had risen to 46 with Montana, Maine, New Hampshire, and South Carolina being the four states that have not yet applied for the extension.⁵

WOULD SUBMISSION OF AN APPLICATION FOR INITIAL EXTENSION VIOLATE MONTANA STATUTE?

In order for Montana to be in compliance with the final rules and provisions of the act, the Attorney General must file a request for an initial extension prior to March 31, 2008. However, such an action might be precluded by the statutory provisions adopted by the 2007 Legislature that prohibit the agency from taking action to implement the provisions of the act. It is legislative staff understanding that the Attorney General will be reviewing Montana's statute related to this issue and determining whether or not to file a request for initial extension of compliance on or before the March 31st deadline.⁶

SUMMARY

In summary, final rules for implementation of the REAL ID Act were recently published. These rules provide the opportunity for states to request an initial extension for compliance with the provisions of the act, which become effective May 11, 2008. This initial extension request must be filed by the Attorney General on or before March 31, 2008. If Montana does not request an extension, it will be found to be non-compliant with the act and as a result state issued driver's licenses and identification cards will not be acceptable for use for an official federal purpose such as boarding a federally regulated aircraft or entry into a federal building.

Legislation passed during the 2007 session prohibits the department for compliance with the REAL ID Act and it is unclear whether or not filing of an initial extension is allowable under Montana statute. The Attorney General is expected to make a decision whether or not to file an initial extension on or before the March deadline for doing so.

Given the limited time for states to either become compliant with the REAL ID Act or request an initial extension for compliance, the LFC may wish to:

1. Encourage the Attorney General to make his determinations of: a) whether the statute allows Montana to apply for an extension; and b) whether an application will be filed on behalf of Montana as soon as possible so that sufficient time remains before the March 31st deadline for the legislature to take action to change statute or direct that an application be filed if it determined such actions would be desirable
2. Take no action, but continue to monitor the situation

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⁴ Personal conversation with Dean Roberts, Administrator Motor Vehicle Division and Skip Culver, Administrator Centralized Services on January 29, 2008.

⁵ Email from Dean Roberts, Administrator Motor Vehicle Division, February 19, 2008 and updated February 20, 2008

⁶ Personal conversation with Dean Roberts, Administrator Motor Vehicle Division and Skip Culver, Administrator Centralized Services on January 29, 2008.